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No. 10-304

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

LOREN J. ZUTZ AND ELDEN J. ELSETH,

Petitioners,

VS.

JOHN NELSON, ARLYN STROBLE; NICK DREES; DOUGLAS KAMROWSKI; ROUGHRIDER LEGAL SUPPORT SERVICES, INC.; DANNY OMDAHL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN NELSON AND ARLYN STROBLE

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QUESTIONS PRESENTED

I. Whether further review of Petitioners' First Amendment retaliation claim is appropriate where the Eighth Circuit correctly applied well-settled law to the allegations in the pleadings before concluding Petitioners have not alleged an actionable retaliation claim?

II. Whether further review of Petitioners' Fourteenth Amendment cause of action is appropriate when the Eighth Circuit correctly applied *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), which holds that harm to reputation, alone, cannot support a Fourteenth Amendment claim as a matter of law?

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STATEMENT

Petitioners' claims against Respondents Nelson and Stroble ("Respondents") arise out of a meeting of the Middle Snake Tamarac Rivers Watershed District Board ("Board") on June 18, 2007. The Board consists of seven members; Petitioners Elseth and Zutz ("Petitioners") and Respondents are four of the members; the remaining three members are not parties to this litigation.

Petitioners allege that Nelson made two statements at the meeting: "I don't think that there is much question that he did [violate the law]," and "[l]aws are being broken by Board Members-enough is enough." Petitioners attribute those two statements as referring to both Petitioners (despite the fact that the first reference was made in the singular). Petitioners also allege that Stroble stated "[w]hy should we provide legal counsel for actions that are against the law?" Petitioners interpret the statement as being directed at them.

Petitioners brought this federal lawsuit against Respondents, alleging defamation claims based on Section 1983. Petitioners moved for dismissal of the Complaint, arguing, *inter alia*, that the lawsuit did not plead actionable Federal claims. Prior to oral argument on this motion, Petitioners sought, and were granted, leave to bring a motion to amend their Complaint. Petitioners then issued a proposed Amended Complaint, which sought to amend the original Count I, into two new counts: Count I, a violation of their First Amendment right to exercise free speech and to petition the government; and Count II, a deprivation of property

without due process, in violation of the Fifth and Fourteenth Amendments.

To support the new claims, Petitioners alleged that the Board, and not Respondents individually, did the following: Refused to rent land to Petitioner Zutz, "censored" Petitioner Elseth and disconnected his water, barred Petitioners from serving on Watershed District committees, did not appoint Petitioners to various positions, and removed Petitioners from the Watershed District's check register.

The Magistrate denied Petitioners' motion to amend the Complaint, concluding the additional claims were futile. This order was confirmed by the District Court and, in addition, the District Court dismissed the Complaint. The Eight Circuit affirmed the District Court.

REASONS FOR DENYING REVIEW

I. Further review of the First Amendment Section 1983 retaliation claim is inappropriate because the Eighth Circuit correctly applied the facts as plead in Petitioners' Complaint to well-established and uniform federal law.

To establish a *prima facie* case of retaliation for exercise of First Amendment rights under 42 U.S.C. § 1983, Petitioners must sufficiently plead that they were (1) engaged in protected activity and (2) that defendants "took adverse action against [them] that would chill a person of ordinary firmness from engaging in that activity." *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir.

2007). Petitioners ask this Court to identify "the extent of allegations necessary" to plausibly plead "adverse action" that would support a First Amendment retaliation claim. Petitioners' inquiry is readily answered by longstanding, uniform law and is inappropriate for Supreme Court review.

"The ordinary-firmness test is well established in the case law, and is designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First Amendment." *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003). The determination of whether government conduct or speech has a chilling effect or an adverse impact is an objective one; the court determines whether a similarly situated person of ordinary firmness reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case. *Lewis*, 486 F.3d at 1028; *see also Blat. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006) (citing *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)); *ACLU v. Wicomico County*, 999 F.2d 780, 786 (4th Cir. 1993); *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) (tailoring adverse impact analysis to specific circumstances presented). Because the analysis is objective, it is resolved as a matter of law. *Ehrlich*, 437 F.3d at 416.

Petitioners do not suggest that the lower courts applied unsettled or novel law. Rather, their Petition asks this Court to review application of the allegations in the pleadings to well-settled federal law. Where the Circuit Court applied the correct law, the Supreme Court will rarely grant review "when the asserted error

consists of . . . misapplication of a properly stated rule of law." S. Court Rule 10; *see also General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-79, 58 S. Ct. 849, 82 L. Ed. 1273 (1938) ("Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

Besides not raising an issue that warrants Supreme Court Review, an analysis of the merits of the allegations leads to a conclusion that in no event do Petitioners adequately allege a viable First Amendment claim. Their Complaint alleges harm to reputation, alone, as the "adverse event" that allegedly provides the basis for a § 1983 claim under the First Amendment. However, public officials such as Petitioners "need to have thicker skin than the ordinary citizen when it comes to attacks on their views." *Mattox v. City of Forest Park*, 183 F.3d 515, 522 (6th Cir. 1999). Since "[c]riticism of public officials lies at the very core of speech protected by the First Amendment . . . . it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002) (citation omitted) (internal quotation marks omitted). The Eighth Circuit properly applied the law to the allegations in the pleading to determine that Petitioners failed to sufficiently plead a Section 1983 First Amendment claim. Therefore, there is no compelling reason for the Supreme Court to grant review.

II. Further review is inappropriate because the Eighth Circuit correctly applied the facts as plead in Petitioners' Complaint to the longstanding, well-established law as annunciated by *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), which holds that harm to reputation, alone, cannot support a Fourteenth Amendment Section 1983 claim as a matter of law.

Petitioners ask this Court to reconsider *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) and depart from almost forty years of precedent that holds harm to reputation, alone, is insufficient as a matter of law to support a Section 1983 Fourteenth Amendment claim. Petitioners rely upon three sources in support of their position: the dissent in *Davis*; *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); and *Jenkins v. McKeithen*, 395 U.S. 411 (1969). (Pet. For Writ of Cert. 9, 10.)

Petitioners' legal authority either predates *Davis* or cites the dissenting opinion in that decision. But the well-reasoned majority opinion in *Davis* explained the reasoning in *Constantineau* before stating that decision was consistent with the ultimate ruling in *Davis*. The Court also distinguished *Jenkins* at footnote four. In short, Petitioners fail to present any legal authority since 1976 which conflicts with or overrules *Davis*. Because Federal Courts, including the Eighth Circuit in this case, have consistently applied *Davis* for almost forty years, Respondents respectfully ask this Court to deny the Petition.

III. Further review of both the First and Fourteenth Amendment Claims is inappropriate because the Eighth Circuit correctly applied the facts as plead in Petitioners' proposed Amended Complaint to the well-established law before properly concluding that any amendment would be futile.

Petitioners argue that even if harm to reputation is not sufficient to establish Section 1983 First or Fourteenth Amendment claims, the lower courts should have allowed them to amend their complaint to allege other harm. Petitioners' suggestion is misplaced because the added allegations of harm involve Board conduct and not conduct attributed to Respondents individually.

It is well-settled that a Section 1983 claim requires proof that a defendant's wrongful conduct caused the constitutional deprivation. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). A complaint is properly dismissed if there is "no causal connection between the alleged deprivations and the challenged conduct." *Id.*

Here, the Eighth Circuit correctly ruled that Petitioners' attempt to amend was futile because the proposed Amended Complaint alleges that the *Board*, not the Respondents individually, caused the additional harm as alleged in the Amended Complaint. Because no causation exists, amending the Complaint would be futile. *In re 2007 Novastar Fin, Sec. Litig.*, 579 F.3d 878, 884 (8th Cir. 2009). Therefore, the Eighth Circuit correctly denied Petitioners' motion and no compelling reason exists for this Court to grant review. *See* S. Court Rule 10; *see also General Talking Pictures Corp.*, 304 U.S. at 178-79.

CONCLUSION

For the reasons set forth above, Respondents John Nelson and Arlyn Stroble respectfully ask this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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